Office - Supreme Court, U.S.
FILED
OCT 24 1952
HAROLD B. WILLEY, Clerk

No. 412

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner*,

v.

CATHOLIC EDUCATION PRESS, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—D. C. GOVERNMENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	PAGE
Summary and Statement of the Matter Involved	1
Jurisdiction	3
Questions presented	4
Reasons relied on for the Allowance of the Writ	4

CITATIONS

CASES:

District of Columbia v. *Pace*, 320 U. S. 698, 702 5

STATUTES:

Act of July 1, 1902, 32 Stat. 620, c. 1352:
Sec. 6 (Par. 10) 2
Act of July 10, 1952, 66 Stat. ... (Public Law 493, 82d Cong. c. 649, 2d Session:
Sec. 3(b) 4
Title 28, United States Code:
Sec. 455 4
Sec. 1254 (62 Stat. 928, c. 646) 4
New Judicial Code, 62 Stat. 908, c. 646, Sec. 455 4
District of Columbia Code, 1940, Title 29, ch. 6 2
District of Columbia Code, 1951:
Sec. 47-1208 2
Sec. 47-2404 4

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

INDEX

	PAGE
Opinions Below	7
Jurisdiction	7
Statement of the Case	7

sonal property from taxation under the general laws applicable to the District of Columbia which exempts "The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain."[1] It claimed the exemption upon the ground that it was a "charitable and scientific institution". (R. 6, Finding 7.)

The respondent (hereinafter referred to as the "Company") was organized for the purpose of taking over the activities which had been theretofore conducted by a Virginia stock corporation of the same name which was dissolved July 31, 1947 (R. 5, Finding 2) the day before the Company took over the business (Pet. Ex. No. 3, pp. 1, 2).

The objects of the Company are "the preparation, publication and distribution of educational, literary, scientific or religious matter"[2] (R. 4, Finding 1). The objects of the dissolved Virginia stock company were substantially the same, and the methods of operation of the two companies were the same as those of any publishing concern (R. 29, 30).

The Company published books, most of the authors of which were members of the faculty of the Catholic University of America, and paid royalties to the authors[3] based upon 10% of the retail prices of the books (R. 11). The prices charged by the Company are about the same as those of any commercial publisher (R. 6, Finding 6). The Company acted as agent and sold books for a music teacher,

---

[1] Par. 10, Sec. 6 of the Act of July 1, 1902, 32 Stat. 620, ch. 1352 (Sec. 47-1208, D. C. Code 1951).

[2] The Company was incorporated under Title 29, Chap. 6, D. C. Code 1940 (same in 1951 Code); but it seems pertinent to point out that the exemption statute involved (Sec. 47-1208, D. C. Code 1951, footnote 1, *supra*) does not exempt the property of religious, mutual improvement, and certain other organizations which may incorporate under Title 29, Chap. 6 of said Code.

[3] All authors, except with respect to one book (R. 24), were paid royalties in the amount of 10% of the retail prices (R. 38, 39).

for which it received 20% of the retail sales (R. 11, 38), and has published and sold various other books, all from a Catholic point of view (R. 5, Finding 3), and a monthly periodical called the Catholic Educational Review (R. 5, Finding 3, R. 11, 12).

The former Board of Tax Appeals for the District of Columbia (now the District of Columbia Tax Court) held that the Company was entitled to the exemption (R. 6-8). The Court of Appeals, by a three-judge division thereof, reversed (R. 54-56). On rehearing en banc the Board of Tax Appeals was affirmed (R. 74-80).

Six days later, on July 9, 1952, one of the Circuit Court judges disqualified himself in a memorandum addressed to the Clerk of the Court, because of employment by the law school of Catholic University in 1949-50, and directed that his name be stricken from the official file copy of the opinion and from the judgment, and that the file show withdrawal of his concurrence in the opinion and judgment of the Court (R. 84). The petitioner thereupon, on July 14, 1952, filed a motion to vacate the order granting rehearing en banc as well as the opinion and judgment filed July 3, 1952, on the ground, among others, that disqualification by a judge who had voted on the petition for rehearing, who heard the oral argument, and who participated in the opinion and judgment on rehearing, voided not only the order for rehearing but the opinion and judgment on rehearing en banc (R. 84-88). The motion was denied September 15, 1952 (R. 94, 95).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered July 3, 1952. The time for filing this petition was extended to October 31, 1952, by order of this Court dated September 11, 1952.

The jurisdiction of this Court to issue the writ applied for is invoked under Title 28, United States Code. Sec. 1254 (62 Stat. 928, c. 646) and Sec. 47-2404, D. C. Code 1951 (52 Stat. 371, c. 223), as amended by Sec. 3(b) of the Act of July 10, 1952, 66 Stat. ..... (Public Law 493, 82d Congress, c. 649, 2d Session).

QUESTIONS PRESENTED

1. Whether the disqualification of a judge after entry of judgment voids such judgment and proceedings incident thereto where the judge has voted on a petition for rehearing, heard the argument on rehearing, and participated in the opinion and judgment on rehearing.

2. Whether a corporation which publishes and sells books on education, religion, history and logic, pays royalties to the authors, acts as agent for a music teacher in the sale of her books on a commission basis, and publishes a monthly periodical, is entitled to exemption from taxation on its personal property as a "scientific institution" within the meaning of the applicable provisions of the District of Columbia Personal Property Tax Exemption Law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance with respect to a statute of the United States which has not been but should be settled by this Court. Sec. 455 of the New Judicial Code, 62 Stat. 908, c. 646 (Title 28, U. S. C., Sec. 455), providing for disqualification of justices and judges of the United States, is based upon a prior law which applied only to District Court judges of the United States. The new law applies not only to those

judges but to judges of the Circuit Courts of Appeal and to this Court. Denial of petitioner's motion to vacate the order granting rehearing en banc, together with the opinion and judgment filed July 3, 1952, because of disqualification of a judge who disqualified himself after entry of judgment resulted in a bias or prejudice exercised against petitioner, without petitioner's knowledge prior to judgment. Since the rehearing was not held before an impartial and disinterested tribunal, petitioner did not have a hearing pursuant to due process of law. The procedure followed by the Court below is one which should not be permitted to become established. This Court should invoke its supervisory and corrective authority to remedy this condition for the guidance of the justices and judges of the courts of the United States and for the protection of all litigants in the Courts of the United States.

2. The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance with respect to the tax laws applicable to the District of Columbia which, if not corrected, may seriously affect the revenues of the District. Although this Court stated in *District of Columbia* v. *Pace*, 320 U. S. 698, 702, that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes limited in their operation to the District of Columbia, this case, like the *Pace* case, appears to be one which this Court should review. The Company in this case, successor to a former stock corporation operated for profit (R. 5, 51, 52), publishes and sells books and periodicals and acts as agent for a music teacher. The authors receive substantial royalties from such sales and a profitable outlet for their products. These operations result in private gain to those individuals and to permit such a company to function on a tax-exempt status is contrary to statute, contrary to prior

decisions of the Circuit Court of Appeals, and contrary to pertinent decisions of this Court.

WHEREFORE, Your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Circuit Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
A municipal corporation,
Petitioner.

By:

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

October 23, 1952

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the Board of Tax Appeals for the District of Columbia (R. 7) and the United States Court of Appeals for the District of Columbia Circuit (R. 54, 74) are not yet reported.

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

STATEMENT OF THE CASE

All that is material to the consideration of the questions presented is, in petitioner's view, set forth in the Summary and Statement of the Matter Involved in the petition, *supra,* pp. 1-3, except that certain additional matters will be brought out in the Argument for purposes of brevity and clarity.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In denying petitioner's motion to vacate the order granting rehearing en banc as well as the opinion and judgment filed July 3, 1952, after rehearing.

2. In holding that the Company herein was entitled to exemption from tangible personal property taxation as a scientific institution not conducted for private gain.

3. In not reversing the decision of the Board of Tax Appeals for the District of Columbia.

STATUTES INVOLVED

Title 28, United State Code, Sec. 455 (62 Stat. 908, c. 646):

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Par. 10, Sec. 6, of the Act of July 1, 1902, 32 Stat. 620, c. 1352 (Sec. 47-1208, D. C. Code 1951):

> "The following personal property shall be exempt from taxation.
>
> "First. The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain."

ARGUMENT

I

The lower Court has decided a question of general importance with respect to a statute of the United States which has not been but should be settled.

This case was first argued on the merits before Circuit Judges Edgerton and Wilbur K. Miller, and District

Judge Arthur F. Lederle, the latter sitting by designation (R. 54). Thereafter the lower Court entered an opinion and judgment reversing the Board of Tax Appeals, Judge Miller dissenting. Judge Edgerton, who wrote the majority opinion, stated (R. 55):

> "* * * The fact that a publishing house specializes in educational, scientific and religious works does not make it what anyone would ordinarily call a scientific institution or, for that matter, an educational institution."

A petition for rehearing en banc and answer thereto were filed (R. 62, 68). On April 28, 1952, before Chief Judge Stephens and Circuit Judges Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy and Washington, in Chambers, a per curiam order was entered granting a rehearing en banc (R. 72). It is noted that District Judge Lederle, who joined Judge Edgerton in deciding the case, did not participate in the consideration of the petition for rehearing (R. 72) or in the consideration of the case on rehearing (R. 74).

On rehearing the Board of Tax Appeals was affirmed, Judge Edgerton dissenting (R. 74, 80). Six days later Circuit Judge Fahy disqualified himself in a memorandum addressed to the Clerk of the Court, because of employment by the law school of Catholic University in 1949-50, and directed that the file show withdrawal of his concurrence in the opinion and judgment of the Court (R. 84). This relationship was, of course, important because on rehearing the majority opinion held that the Company herein was an "integral part" of Catholic University (R. 78), whereas the majority opinion of the three-judge Court, written by Judge Edgerton, had held otherwise, relying on a decision of this Court, *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 441 R. 56). The majority opinion on rehearing cites no au-

thority on this point. Subsequently, on July 18, 1952, Chief Judge Stephens filed an order directing the Clerk to add a notation at the end of the majority opinion on rehearing that he "concurs in the result" (R. 89), thus clearly indicating that he no longer concurred in the reasoning of the majority opinion.

In Judge Fahy's opinion it was improper for him to sit on rehearing in this case. It is expressly declared in Sec. 455 of the Judicial Code, *supra*, that a judge of the United States shall disqualify himself in any case in which it is improper, in his opinion, for him to sit on appeal or other proceeding therein. It is too late after the opinion and judgment have been filed to remedy what in Judge Fahy's own opinion was an impropriety by the simple expedient of withdrawing concurrence in the opinion and judgment of the Court. The damage has been done. This fact, the fact that Chief Judge Stephens no longer concurs in the reasoning of the majority opinion, and the fact that District Judge Lederle did not participate in the consideration of the petition for rehearing as well as in the rehearing and opinion appears to render the judgment on such rehearing *coram non judice* and void. In *American Construction Company* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 370, 387, 37 L. Ed. 486, 492, which involved, *inter alia*, disqualification of a judge of a circuit court of appeals, this Court said:

> "* * * If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari."

Preceding the matter just quoted this Court said that the matter was an important one, deeply affecting the administration of justice in the circuit court of appeals.

The almost uniform current of authority is to the effect that any judgment rendered by a disqualified judge is void even where the disqualified judge has acted simply as one of a bench composed of several judges. *Case* v. *Hoffman, et al.*, 100 Wis. 314, 74 N. W. 220 (1898), 75 N. W. 945. There are several reasons justifying avoidance of a judgment of a court when part of the judges are disqualified. One of the more prominent is the possibility that the other judges may be influenced by the participation of a disqualified judge. Another is that a judge should abstain from putting himself in such a position that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind. L. R. A. 1918-D, p. 244; and in 30 *Am. Jur., Judges*, Sec. 53, it is stated:

> "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. It has been pointed out elsewhere that due process of law requires a hearing before an impartial and disinterested tribunal. Every litigant, including the state, in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge, and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent."

II

The lower Court has decided a question of general importance with respect to the tax laws applicable to the District of Columbia which, if not corrected, may seriously affect the revenues of the District.

It is a well-established rule of law that charitable and educational institutions cannot be exempted from taxation in the absence of a constitutional or statutory provision

granting exemption.[4] It is also a well-established rule of law that the grant of tax exemption to such institutions is founded upon the fundamental ground of benefit conferred upon the public by such organizations and the consequent relief of the government's burdens.[5] The lower Court followed these rules in its decisions prior to the instant case, relying on a wealth of authority, including decisions of this Court, in the cases of *District of Columbia* v. *Mt. Vernon Seminary*, 69 App. D. C. 251, 100 F. 2d 116, and *Hazen* v. *National Rifle Assn.*, 69 App. D. C. 339, 101 F. 2d 432. In the former case the exemption was allowed because the seminary was an "institution of learning" which performed a function which must have otherwise been performed by the government and, consequently, came within the aforesaid reason for the subsidy which is implicit in such tax exemptions. In the latter (*Hazen*) case the exemption was denied, the Court stating (69 App. D. C. 343):

> "For all these reasons, therefore, the necessity for governmental subsidy or immunity which is implicit in tax exemption—upon the theory that the government is relieved of its burdens—fails in the present case."

In the present case the Court on rehearing completely ignored this fundamental theory. The Company, unlike Mt. Vernon Seminary which was an institution of learning, is organized and functions as a publishing house, specializing in educational, scientific and religious works, as pointed out by Judge Edgerton in his opinion (R. 55). It is, therefore, obviously on the same plane as other presumably tax-paying dealers who specialize in various books, particularly religious books, such as Gladys M. Bowling, who deals in bibles and everything for the church and Sunday school, the

---

[4] 51 *Am. Jur., Taxation*, Sec. 554.
[5] Id., Secs. 554 and 600.

Church Book Shop, specializing in books and supplies for Protestant churches and church schools, and Pursell's Book Store, which deals in bibles, cook books, dictionaries, garden books and books on flower arrangements.[6]

The Company in the present case does not relieve the government of any part of its burdens and, therefore, does not meet the basic requirement for tax exemption. If the decision of the lower Court is allowed to stand there would appear to be nothing to prevent the faculty of any university, school or college, or groups of doctors, lawyers, engineers, architects, and the like, from incorporating under District law and publishing ~~the~~ and selling text or other professional books under claims for tax exemption as educational institutions. Furthermore, if the exemption granted under the majority opinion in this case is allowed to stand, the tax burdens of other property owners (not exempted) would be increased. Sec. 47-501, D. C. Code 1951, requires the Commissioners of the District to annually fix such rates of taxation on real and personal property as will produce the money necessary to defray the District's share of expenses during the year for which the rate is fixed. Obviously, therefore, to exempt this publishing house from taxation is, in effect, a shifting of its tax burden (sic) to the shoulders of the public. See *American Sunday-School Union* v. *Taylor*, 161 Pa. St. 307, 29 A. 26, 27.

The Company is not only organized but is operated for the ordinary business purposes of publishing and marketing the books and pamphlets of various authors and its own publication. This constitutes a business purpose for the private gain of individuals contrary to the exemption statute involved and contrary to the tax-exemption principles set forth by this Court in *Better Business Bureau of Washington, D. C., Inc.* v. *United States*, 326 U. S. 279.

---

[6] Pages 125, 126, of the current (November, 1951) issue of the Washington (D. C.) Classified Telephone Directory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 412

DISTRICT OF COLUMBIA, *Petitioner*,

v.

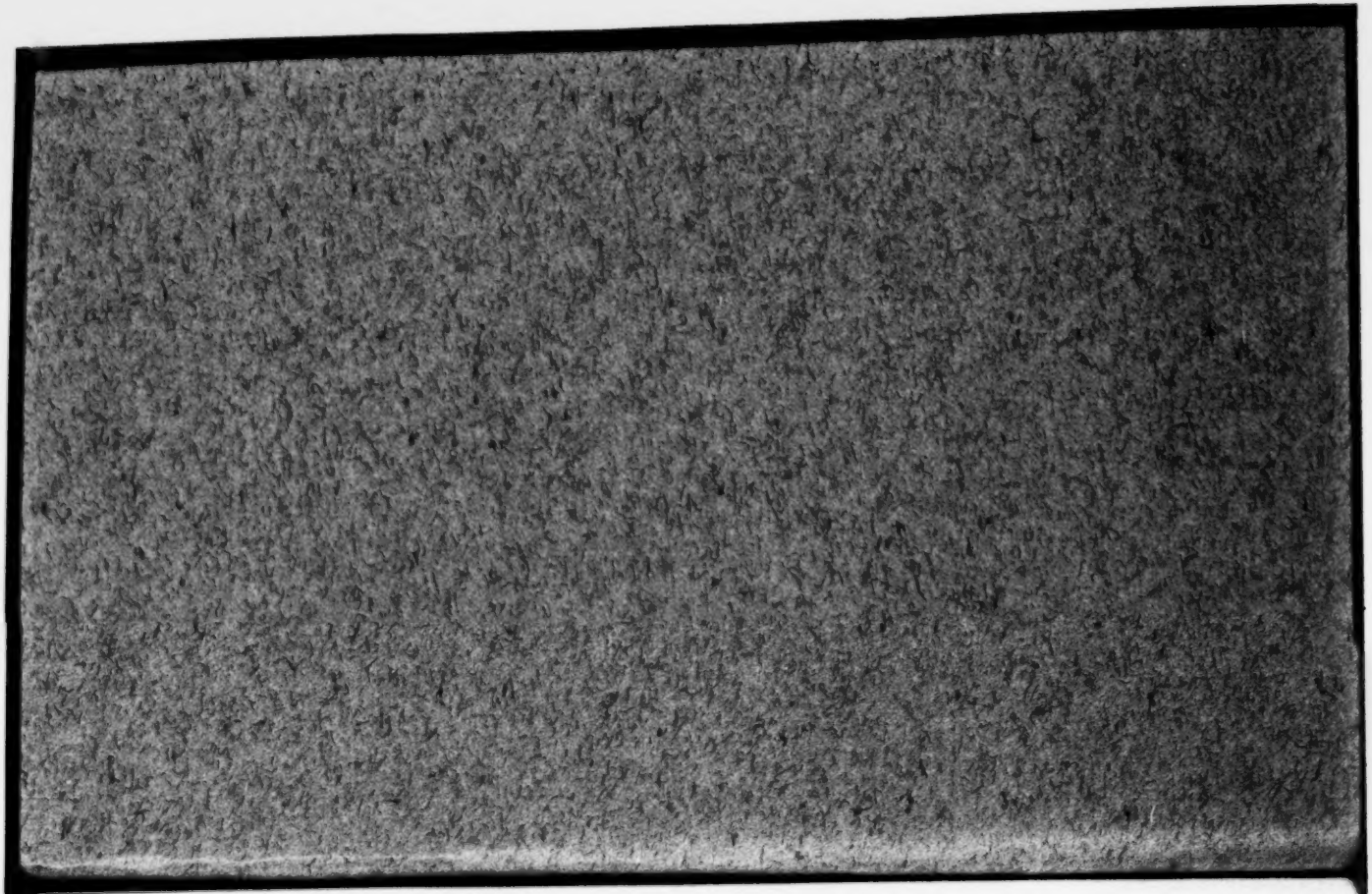
CATHOLIC EDUCATION PRESS, INC., *Respondent*.

BRIEF FOR RESPONDENT CATHOLIC EDUCATION PRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE E. HAMILTON, JR.
JOHN L. HAMILTON,
Attorneys for Respondent Catholic Education Press, Inc.

Washington, D. C.,
November 21, 1952.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

Subject Index.

	Page
Statement of the Case	1
Summary of Argument	4
Argument:	
I. The Action of the Court of Appeals in Overruling Respondent's Motion to Vacate the Judgment Does Not Raise Any Question of General Importance Which Would Justify This Court in Granting Certiorari	5
II. The Decision of the Lower Court Involves Only a Local Taxing Statute and Can in No Way "seriously Affect the Revenues of the District." The Opinion of the Court of Appeals is Sound and Right	9
Conclusion	10

CASES CITED.

Biggins v. *Lambert*, 213 Ill., 625, 73 N. E. 371 (1905)	8
Case v. *Hoffmann*, et al, 100 Wis. 314, 74 N. W. 220 (1898)	6
Curtis' Estate v. *Piersol*, 117 Md. 170, 83 Atl. 87 (1912)	8
Del Vecchio v. *Bowers*, 269 U. S. 280	9
District of Columbia v. *Mt. Vernon Seminary*, 69 App. D. C. 251, 100 F. (2d) 116	10
District of Columbia v. *Pace*, 320 U. S. 698	9
Hazen v. *National Rifle Association*, 69 App. D. C. 339, 101 F. (2d) 432	10
State ex rel Getchel v. *Bradish, et al*, 95 Wis. 205, 70 N. W. 172 (1897)	6
State ex rel Langer v. *Kositzky*, 38 N. D., 616 166 N. W. 534 L.R.A. 1918 D 237 (1918)	7

STATUTES CITED.

Act of July 1, 1902, 32 Stat. 620, c. 1352 Sec. 6 (Par. 10)	1
Title 29, District of Columbia Code 1940, Chap. 6	2
Title 28, United States Code, Sec. 455	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No.

DISTRICT OF COLUMBIA, *Petitioner,*

v.

CATHOLIC EDUCATION PRESS, INC., *Respondent.*

BRIEF FOR RESPONDENT CATHOLIC EDUCATION PRESS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

This case is concerned with the exemption of Catholic Education Press, Inc., the Respondent herein, from the payment of personal property taxes to the District of Columbia under a local taxing statute. (Par. 10, Sec. 6, of the Act of July 1, 1902, 32 Stat. 620, c. 1352 (Sec. 47-1208, D. C. Code 1951)).

Respondent, hereinafter referred to as the "Press", paid under protest personal property taxes in the amount of $1,524.52 for the tax years ended June 30, 1949 and June 30, 1950 and thereafter duly appealed to the Board of Tax

Appeals for the District of Columbia. The Board of Tax Appeals concluded as a matter of law that the Press was a scientific institution, not conducted for private gain, within the meaning of the statute and that its personal property was exempt from taxation. The Board thereupon cancelled the assessment of taxes in question and determined that the Press was entitled to a refund of the taxes paid. The District of Columbia thereafter petitioned the United States Court of Appeals for the District of Columbia Circuit for a review and that Court, by a three judge division thereof, reversed, Judge Edgerton writing the majority opinion and Judge Miller dissenting. The Press thereafter petitioned for a rehearing en banc which was granted. On rehearing en banc the United States Court of Appeals for the District of Columbia Circuit affirmed the Board of Tax Appeals by a vote of seven to one (Judge Edgerton dissenting and Judge Prettyman not participating in the decision). Subsequent to the entry of the decision and the judgment of the Court, Judge Fahy, in a memorandum to the Clerk of the Court stated in part: "On more mature consideration, I think I should have disqualified in this case because of employment by the Law School of Catholic University in 1949-50 * * *," and directed that his name be stricken from the official file copy of the opinion and the judgment and that the file show withdrawal of his concurrence in the opinion and judgment. The District of Columbia thereupon filed a motion to vacate the order granting rehearing en banc and the opinion and judgment, which motion was denied.

The Respondent is a non-stock, non-profit corporation incorporated July 17, 1947 under sub-chapter 3 of Chapter XVIII of the Code of Laws for the District of Columbia (District of Columbia Code 1940, Title 29, Chap. 6). Its objects as stated in its Charter are "the preparation, publication and distribution of educational, literary, scientific, or religious matter." (R. 4 and 5.)

Under its By-Laws (R. 47-50) the Press has the same officers as The Catholic University of America and the direction, control and management of the Press are vested in a Board of Trustees which is composed of the Executive Committee of the Board of Trustees of The Catholic University of America. The By-Laws also provide (R. 48, 49) that the promotion of the objectives of the Press is entrusted to a press or managing committee of which the Assistant Treasurer of The Catholic University of America is ex officio a member and which is named by the Board of Trustees. This committee is composed exclusively of members of the Administration and Faculty of The Catholic University of America. (R. 22).

The Press maintains no bank account; its financial accounts are kept by the General Accounting Office of the Catholic University which pays all of its bills. (R. 17-18). None of the Press' officers receive any salary except the Assistant Secretary-Treasurer who receives a salary of $1,200.00 a year, not as an officer, but as Manager of the Press (R. 21). For the eleven (11) months' period ended June 30, 1948, the Press incurred a net loss of $11,582.53 and for the year ended June 30, 1949, made a net profit of $2,652.79. (Press' Exhibits #3 and 4). Its net deficit for the former period was taken care of by advances from the Catholic University and its profit for the latter period was used to reduce the deficit of the previous year (R. 21, 25-27). No part of the profit of the Press at any time was paid to any individual (R. 21-22) and any net profit from operations must be devoted exclusively for scientific, educational purposes (R. 26-28).

The Press does no printing. Its printing is done under contract with certain independent printers (R. 24). It publishes textbooks and books relating to education (See Press' original Exhibits #5, #6, #7, #12 and #13). The purchasers of the books published by the Press are educators, schools and persons of culture, particularly interested in the scientific aspects of education (R. 23). It also publishes

"The Catholic Educational Review", a monthly periodical which is sold to persons actively engaged in teaching and in the administration of schools (R. 23). The purpose of "The Catholic Educational Review" is to give technical and practical advice to teachers and administrators of schools and to discuss general problems of current and historical or theoretical interest to educators (R. 23). Practically all of the authors of the various publications of the Press are members of the Faculty of Catholic University and all publications must be submitted to the managing or press committee for its recommendation (R. 22-23).

Except where royalties were waived, the Press has paid royalties to the authors of various publications (R. 24). It has also sold, on commission for the owner, books on music for use in Catholic schools. These commissions represented 3.8% of its gross income for the eleven (11) months ended June 30, 1948 and 2.5% of its gross income for the year ended June 30, 1949 (R. 5, Finding #3).

SUMMARY OF ARGUMENT

No question of importance to the public or of general interest is involved in this case and for that reason alone certiorari should be denied. The decision of the court below rendered by a panel consisting of eight judges and decided by a majority of seven to one is not effected by the voluntary disqualification after judgment of one of the judges who concurred with the majority nor does his disqualification under the circumstances raise any question of general importance relating to a statute of the United States. The decision of the United States Court of Appeals for the District of Columbia Circuit en banc is sound and presents no question which should be reviewed by this Court.

ARGUMENT

I

The Action of the Court of Appeals in Overruling Respondent's Motion to Vacate the Judgment Does Not Raise Any Question of General Importance Which Would Justify This Court in Granting Certiorari.

The Board of Tax Appeals of the District of Columbia and the Court of Appeals sitting en banc, have determined that the personal property of the Respondent was exempt from District of Columbia Personal Property Taxes. The exemption statute is a local statute and the question as to whether Respondent is entitled to be exempted is purely a local matter.

Notwithstanding the local nature of the litigation, the District of Columbia has asked this Court to review the merits of the case, asserting that because one of the eight judges of the Court of Appeals who heard the case disqualified himself after the opinion and judgment, a question of general importance arises with respect to a statute of the United States which has not been, but should be, settled by this Court. The statute (Title 28, United States Code, Sec. 445 [62 Stat. 908, c. 646]) provides in part and in substance that a judge shall disqualify himself if he is so related or connected with any party as to render it improper for him in his opinion to sit on an appeal. The disqualification of a judge because of prior relationship or connections would appear to be mandatory only after the judge concerned has arrived at the opinion that it would be improper for him to sit. In this case Judge Fahy undoubtedly did not think it improper for him to participate with the other members of the Court until after the opinion was rendered, or, if it occurred to him, he apparently did not think that his lecturing for a department of Catholic University two years prior to the arguing of the case was of such an interest or connection as to render it improper for him to sit. When he decided that it was improper, he immediately disqualified himself.

It should be noted that the statute does not declare under what circumstances a judgment of a circuit court may be invalidated. It most certainly does not negate the proceedings of a circuit court where one of the judges of a substantial majority voluntarily disqualifies himself after opinion and judgment. Actually, therefore, the action of Judge Fahy does not involve a construction or application of the statute and the validity or invalidity of the judgment must be resolved by reference to general law.

The statement in Petitioner's brief, "the almost uniform current of authority is to the effect that any judgment rendered by a disqualified judge is void even where the disqualified judge has acted simply as one of a bench of several judges," is not an accurate statement nor is it supported by authority. *Case* v. *Hoffmann, et al,* 100 Wis. 314, 74 N. W. 220 (1898) the only case relied upon by Petitioner, certainly does not support Petitioner's general statement. In that case the Supreme Court of Wisconsin construed the following Wisconsin statute (2580 Rev. St.):

> "• • • No judge of an appellate court . . . shall decide or take part in the decision of any case or matter which shall have been determined by him while sitting as a judge of any other court unless there shall not be a quorum without him."

It appeared that a judge participating in the Supreme Court decision had sustained a demurrer in the same action while sitting on the circuit court and hence the matter same clearly within the purview of the statute. Significantly, in that case, one of the members of the court concurred with the majority although in a prior decision of the same court, *State ex rel Getchel* v. *Bradish et al,* 95 Wis. 205, 70 N. W. 172 (1897), at page 174, he stated in his dissenting opinion:

> "The furthest our courts have gone on the subject is to hold that, if the presence of the interested member of the tribual is necessary to make a quorum, or his

vote to determine the result, the proceedings are void * * *."

The weight of authority as established by the various State courts supports the proposition that the participation of a disqualified judge in a judicial body where a majority of the members of the court are qualified, does not render the judgment void.

In *State ex rel Langer* v. *Kositzky*, 38 N. D., 616, 166 N. W. 534 L. R. A. 1918 D 237 (1918), the North Dakota Supreme Court stated:

"* * * It is unnecessary to determine whether Justice Robinson, because of any interest in the result, was disqualified to sit as a member of this court upon the hearing and determination of the issues in this proceeding. The fact remains that the court as constituted included four district judges qualified to act, and who constituted a quorum and a majority of the members of said court, and who were invested, so far as this controversy is concerned, with the same power and authority, and whose judgment is entitled to the same force and effect, as that of the justices who are the regularly elected members of the court. State ex rel, Linde v. Robinson, 35 N. D. 410, 160 N. W. 512; State ex rel Linde v. Robinson, 35 N. D. 417, 160 N. W. 514.

"The mere presence of and participation by a member of a judicial body disqualified to act in a particular case does not necessarily invalidate the proceedings and judgment of that body. Particularly is this true if his presence is not necessary to constitute a quorum, or his vote does not determine the result. State ex rel Getchel v. Bradish, 95 Wis. 205, 37 L. R. A. 289, 70 N. W. 172, dissenting opinion of Justice Marshall."

"* * * To hold that the mere participation by any justice of the supreme court in a case in which he is disqualified to act would invalidate the proceedings and judgment of the court would give to such justice the power, if he so willed, to absolutely bar the door of justice, which should be open to all, against one of the parties. * * *"

In *Biggins* v. *Lambert*, 213 Ill., 625, 73 N. E. 371 (1905), the court stated:

> "Finally, it is suggested that because a change of venue in the circuit court was taken from one judge on the ground of prejudice, and that same judge afterwards sat as a member of the Appellate Court before whom this case was taken, that was prejudicial error. We do not think so. The Appellate Court was composed of three judges, at least two of whom were not subject to the objection made."

In re *Curtis' Estate* v. *Piersol*, 117 Md. 170, 83 Atl. 87 (1912), the Court of Appeals of Maryland similarly determined that the signature by a disqualified judge to an order appointing an administrator, which also had been signed by the two other judges of the court did not render the appointment void and "could in no wise affect the question of jurisdiction."

There is no merit in the Petitioner's contention that bias or prejudice was exercised against it without its knowledge. The petition for rehearing was considered by nine judges in chambers. The argument on the rehearing was heard before eight of the nine judges of the court and the majority opinion on rehearing was concurred in by six judges, exclusive of Judge Fahy. The District's motion to vacate the judgment because of Judge Fahy's disqualification was considered by the full court with Judge Fahy not participating. By its per curiam order overruling the District's motion, unanimously concurred in by eight judges, the court obviously concluded that there had been no failure to give the District a fair and impartial hearing.

II

The Decision of the Lower Court Involves Only a Local Taxing Statute and Can in No Way "seriously Affect the Revenues of the District." The Opinion of the Court of Appeals Is Sound and Right.

Under the second part of its argument the Petitioner has presented no grounds for certiorari under the rules of this Court. The personal property taxing statute, under which the Press claimed an exemption, has application only to the District of Columbia. It has been determined by this Court on several previous occasions that this Court will not review decisions of the Court of Appeals which are based upon statutes relating entirely to the District of Columbia. *Del Vecchio* v. *Bowers,* 269 U. S. 280; *District of Columbia* v. *Pace,* 320 U. S. 698.

The taxes in question for the two calendar years concerned involve only a total amount of $1,524.52. The decision of the Court of Appeals in this case certainly does not establish any precedent that may seriously affect the revenues of the District of Columbia as alleged by the Petitioner. The Court of Appeals decision exempted the Press from the application of the tax because it was an integral part of the Catholic University of America, a scientific institution. This Court can take judicial notice that there are at most, very few other similar institutions in the District of Columbia that can qualify for exemption under the Court of Appeals decision.

Both the Board of Tax Appeals for the District of Columbia and the Court of Appeals, after reviewing all of the evidence, found as facts that the Press is an integral part of Catholic University. Both the Board of Tax Appeals and the Court of Appeals determined that the Press was a scientific institution not conducted for private gain within the meaning and intent of the exemption statute. There is no evidence in the Record to support the baseless allegations made by the District of Columbia that the Press was operated for profit. Furthermore, the District by references

in its brief to advertisements found in the Washington classified telephone directory, has gone outside the record of the case, in its endeavor to identify the Press with commercial book stores.

The Court of Appeals based its opinion on rehearing en banc entirely upon two of its previous decisions, namely, *District of Columbia* v. *Mt. Vernon Seminary*, 69 App. D. C. 251, 100 F. (2d) 116 and *Hazen* v. *National Rifle Association*, 69 App. D. C. 339, 101 F. (2d) 432, which construed the same local tax statute. There are no applicable decisions of this Court; no constitutional questions involved and the decision of the Court does not conflict with the decision of any other Circuit Court of Appeals. The decision of the Court of Appeals therefore obviously presents no ground for the granting of a writ of certiorari.

CONCLUSION

It is submitted that this case lacks any showing of grounds for the issuance by this Court of the writ of certiorari and there is no valid reason for this Court to review the decision of the Court of Appeals.

Respectfully submitted,

GEORGE E. HAMILTON, JR.
JOHN L. HAMILTON
Attorneys for Respondent
Catholic Education
Press, Inc.
Washington, D. C.

November 21, 1952.